Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States of America

RICHARD E. BUCKLEY,

PETITIONER,

v.

LUCILLE G. MEIS, REGIONAL CHIEF COUNSEL, OFFICE OF THE GENERAL COUNSEL, SEATTLE REGION X, SOCIAL SECURITY ADMINISTRATION, ET AL.

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves federal employees' rights to assert the protections provided under the United States Constitution separate and distinct from those provided under the Civil Rights Act of 1871 (42 U.S.C. § 1985(3)). The Civil Rights Act of 1871 (42 U.S.C. § 1985(3)) provides a cause of action for conspiratorial deprivation of equal protection of the laws or privileges and immunities, but is not available to redress actions taken under color of federal law. Public employees are also protected against certain forms of employment discrimination by the federal Constitution. Additionally, this case also involves the right to sue federal officials in a personal capacity for damages resulting from violation of an individual's constitutional rights established by this Court in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.[1] The questions presented are:

1. Whether a federal employee may assert the rights and privileges that are her or his guarantees under the First Amendment Freedom of Speech Clause entitling her or him to freedom of expression, the Fourth Amendment Search and Seizure Clause providing her or him protection from unlawful search and seizure and ensuring her or him an expectation of privacy, when reasonable, prohibiting unlawful instruction upon the same, and the Fifth Amendment Due Process Clause ensuring her or him due process of law, all separate and distinct, from the Civil Rights Act of 1871 (42 U.S.C. § 1985(3)), a determination that this Court has repeatedly answered most positively, and those rights created by this Court in Bivens. Id.

2. Whether a federal employee in the excepted service may assert a right to sue federal officials in a personal capacity for damages resulting from violation of an individual's constitutional rights established by this Court in Bivens, the resolution of which question would resolve the conflict among the circuits concerning the same issue. Id.

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[1] Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 29 L.Ed. 619, 91 S.Ct. 1999 (1971).

PARTIES TO THE PROCEEDING

RICHARD E. BUCKLEY appeared below as plaintiff-appellant and submits this petition for a writ of certitioni in his capacity as petitioner pro se, attorney at law. His address is 14020 12th Ave NE, Apt 202J, Seattle WA, 98125.

The following persons appeared below as defendants'/appellee's and appear herein as respondents: LUCILLE G. MEIS, Regional Chief Counsel, Office of General Counsel, Seattle Region X, Social Security Administration; CHRISTINE R. HENDON, Staff Assistant, Office of the General Counsel, Seattle Region X, Social Security Administration; LISA DESOTO, General Counsel, Office of General Counsel, Social Security Administration; RANDOLPH W. GAINES, Deputy Chief Counsel, Office of the General Counsel, Social Security Administration; JO ANNE B. BARNHART, Commissioner of Social Security; BRIAN KIPNIS, Assistant United States Attorney, Office of the United States Attorney; JOHN ASHCROFT, United States Attorney General, and the SOCIAL SECURITY ADMINISTRATION. These Respondents were represented by Marion Mittet, Assistant United States Attorney, 601 Union Street, Suite 5100, Seattle, WA 98101-3903.

Although not immediately relevant to the issues presented to this Court, Mr. Buckley has encountered difficulty in maintaining consistently in the identification of these parties as respondents in the court of appeals. Initially, the above named parties were properly identified as respondents, which is the correct manner in which they should be so identified. The court of appeals subsequently divided some of these respondents into defendants without cause or reason. Mr. Buckley contacted the clerk of the court or appeals to inquire why this was done. He was

instructed to send a letter explaining that the separation of respondents into the two categories was incorrect, and that the oversight would be amended. Mr. Buckley did so, and the court of appeals corrected the problem, but has now reverted to the mistaken identification of respondents as part defendants once again.

RULE 29.6 STATEMENT

Petitioner. Richard E. Buckley, submits the following statement of his corporate interests and affiliations for the use of the justices of the Court:

1. Mr. Buckley is not a publicly held corporation or other publicly held entity.

2. No publicly held corporation or entity owns 10 percent or more of Mr. Buckley's stock, and in fact, Mr. Buckley currently possess no stock holdings.

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OPINIONS BELOW

The opinion of the court of appeals (App. B) is reported at 76 Fed.Appx. 192, 2003 WL 22204102 (9th Cir 2003) (Not selected for publication in the Federal Reporter). The opinion of the district court is unreported.

JURISDICTION

The court of appeals' judgment was entered on September 23, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment Freedom of Speech Clause, entitling citizens to freedom of expression provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const, amend. I. The Fourth Amendment Search and Seizure Clause, providing citizens protection from unlawful search and seizure, provides in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend IV. The Fifth Amendment Due Process Clause, ensuring citizens due process of law, does provide in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeapordy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V. This Court determined in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics[3] that federal officials acting under the color of authority can be sued in a personal capacity for damages resulting from violation of an individual's constitutional rights thus fashioning a judicially created remedy.

This case also involves the Civil Rights Act of 1871 (42 U.S.C. § 1985(3)).[4] The relevant portions are set forth in Appendix C to this petition.

STATEMENT

This case raises important questions concerning constitutional issues and their invocation by separate vehicles available in law. In particular, an aggrieved party in federal employment, as an excepted service General Attorney,[5] whose constitutional rights have been violated may, under the correct

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[3] Bivens, 403 U.S. at 392-96, 29 L.Ed. at 2003-05, 91 S.Ct. 1999 (1971).

[4] Pub. L. No. 95-454, §907, 1978, 1978 U.S.C.C.A.N. (92 Stat.) 1111, 1227 (codified in various section of 5 U.S.C.).

[5] The CSRA divides federal employees into four categories: (1) those in the "competitive service;" (2) those who are "preference eligible;" (3) those in the "excepted" service; and (4) "probationers." See Harrison v. Bowen, 815 F.2d 1505, 1510 (D.C. Cir. 1987); 5 U.S.C. § 2102(a)(2); 2103. The substantive rights and procedural protections provided a federal employee depend upon the category of her or his employment.

circumstances, seek redress by a complaint addressing an adverse employment action by governmental body remedial by a statutory scheme. Alternatively, the employee may seek remedy identifying the same injury as constituting an unconstitutional infringement of particular constitutional rights. That the federal employee does request a court to consider, in a separate cause of action, that a statutory method of relief, namely 42 U.S.C. § 1983, be extended where it normally is not applicable, should not allow a court to then adversely deny the federal employee's separate and distinct constitutional causes of action based on its interpretation of the limited application of 42 U.S.C. § 1983.

1. The government as employer[6] has far broader powers than does the government as sovereign," and because of the "practical realties of government . . . must be able to restrict its employees [First Amendment rights]" in appropriate circumstances.[7] On the other hand, the First Amendment does afford public employees some protection against retaliation based on their speech,[8] beliefs and associations. This Court has concluded that the determination

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[6] See Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995) (otherwise private corporation is considered government action under First Amendment when: (1) corporation is created for furtherance of government activities, and (2) government retains permanent authority to appoint majority of directors of corporation; Blackburn v. Marshall, 42 F.3d 925 (5th Cir 1991), cert denied 503 U.S. 936 (1992) (en banc); Smith v. Cleburne County Hospital, 870 Hospital, 755 F2d 455 (5th Cir. 1985) treating doctors with staff privileges at public hospitals as public employees for purposes of First Amendment analysis. Cf. Hall v. American Nat. Red Cross, 86 F3d 919 (9th Cir 1996) (American National Red Cross satisfied first prong of Lebron test, but not second).

[7] Waters v. Churchill, 511 U.S. 661, 114 S.Ct. 1878, 128 L.Ed2d 686 (1994). Cf. Tucker v. California Department of Education, 97 F.3d 1204 (9th 1996) (orders banning religious advocacy and display of religious materials outside employees' cubicles and offices unconstitutionally broad).

[8] See also Dambrot v. Central Michigan University, 55 F.3d 1177 (6th Cir. 1995) (state university's ban on racial and ethnic harassment violative of First Amendment because of overbreadth and vagueness).

regarding whether an adverse employment action by a government body constitutes an unconstitutional infringement of employee First Amendment rights entails a balancing of the government's interests as employer in effective and efficient government against the particular employee right involved and the circumstances in which those rights were asserted.[9] Where the adverse action in question is based on discrete incidents of speech, and not political patronage, it is necessary to apply the test set forth in Pickering v. Board of Education of Township High School District 205,[10] balancing the employer's interests in promoting the efficiency of the public services it performs against the employee's interest, as a citizen, in commenting upon matters of public concern.[11]

2. Speech disclosing evidence of corruption, impropriety, or other malfeasance by public officials is generally considered a matter of public import.[12] Protests against discrimination are inherently of public concern.[13] Speech designed to bring to light matters concerning public safety and adequacy of public

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[9] See Pickering v. Board of Education Township High School District, 205, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed 2d 811 (1968). Cf. United States v. National Treasury Employees Union, 513 U.S. 454, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995) (government's burden is greater when imposing wholesale deterrent to board category of expression than it is with respect to isolated disciplinary action).

[10] Pickering, 391 U.S. at 88 S.Ct at, 20 L.Ed.2d at 811 (1968).

[11] E.g., Jantzen v. Hawkins, 188 F.3d 1247 (9th Cir. 1999) applying Pickering balancing test to claim of candidate who announced that he would run against incumbent sheriff); Lewis v. Cohen, 165 F.3d 154 (2nd Cir 1999) (discharge of policymaker for refusing to carry out superior's policy directives was discharge for speech, not political affiliation, and Pickering balancing was applicable).

[12] Fazio v. San Francisco, 125 F.3d 1328 (9th Cir 1997), quoting Wilbur v. Mahan, 3 F.3d 214 (7th Cir. 1993).

[13] Givhan v. Crow, 142 F.3d 1379 (11th Cir. 1998) (police officer's report on results of accident investigation was not protected which was generated in normal course of duties as accident investigator and not for purposes of raising issues of public concern).

protection is generally of public concern.[14] Regarding context, a critical factor is whether the speech is "made primarily in the [employee's] role as a citizen or primarily in his role as employee."[15] A statement that addresses a matter of public concern is not necessarily rendered unprotected merely because it is communicated privately rather than publically,[16] although sometimes the fact the speech is made in the context of private communications with the employer suggests that the speech is private, rather than public, in context. The "inappropriate" or "controversial" character of a statement is irrelevant in determining whether it deals with a matter of public concern. Moreover, a statement may be a matter of public concern despite the fact that it is subsequently demonstrated to be incorrect. The First Amendment protects the right to "petition the Government for redress of grievances." Protests against discrimination are inherently of public concern.[17] Lawsuits and grievances against public employees have uniformly been held to constitute protected activity.[18] One court has held that any public employees' lawsuit or grievance that is not a sham is protected if it constitutes a "petition" within the meaning of the First

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[14] E.g., Gustafson v. Jones, 117 F.3d 1015 (7th Cir. 1997) (speech concerning adequacy of police protection).

[15] Terrell v. University of Texas System Police, 792 F.2d 1360 (5th Cir 1986). See Connick v. Meyers, 461 U.S. 138, 147, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983) (employee must speak our at least partly as citizen).

[16] Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) (remark by one employee to another); Benningfield v. Houston, 157 F.3d 369 (5th Cir 1998) (fact that plaintiffs chose to file internal grievances rather than publicize their complaints not dispositive.

[17] E.g., Coady v. Steil, 187 F.3d 727 (7th Cir. 1999) (firefighters' placement of sign atop his car in support of certain candidate for public office constitutes political speech).

[18] See Grigley v. Atlanta, 136 F.3d 752 (11th Cir. 1998) (adopting majority view that Petition Clause of Fist Amendment is not entitled to any greater protection than Free Speech Clause; public concern requirement applies to retaliation claims based upon right to petition government).

Amendment, without regard to whether the issue involved is one of public concern, reasoning that "the First Amendment's petition clause imposes on the United States an obligation to have at least some channel open for those who seek redress for perceived grievances."[19]

3. On July 25, 2002, Lucille Meis attended a critical conference call, unprepared and unfamiliar, for an Equal Employment Opportunity Commission (EEOC) case assigned to Mr. Buckley. Mr. Buckley was on accrued leave, but had asked the office staff, and Ms. Meis herself, to inform him if such a conference call were scheduled. They neglected to do so. On July 30, 2002, Mr. Buckley wrote Ms. Meis to explain that he felt it was his responsibility to inform the client, the Seattle Regional Office of Hearings and Appeals (OHA), of the problems created CREO that lead to Ms. Meis being unprepared for the conference call, and the office staff, and also felt he needed to inform OHA of the receipt of a settlement offer in the same EEOC case. Ms. Meis responded, "Let's discuss," but did not provide Mr. Buckley with an opportunity to do so. In July 2002, the office staff at Seattle Office of General Counsel, Social Security Administration (Seattle OGC), began to express their interpretation of Ms. Meis' inaction as an indication that the problems Mr. Buckley identified were not of any great importance. Ms. Buckley then wrote the staff a letter on July 31, 2002. He explained that he had not been provided critical discovery documents, addressed the unproductive comments of the staff, informed the staff of the critical importance of the problems raised in connection with Mr. Buckley's defense of the Agency in the EEOC case. On July 31, 2002, Ms. Meis instructed the office staff to destroy this communication, and called Mr. Buckley into her office. She

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[19] San Filippo v. Bongiovanni, 30 F.3d 424 (3rd Cir 1994). Compare Belk v. Minocqua, 858 F.2d 1258 (7th Cir 1988) ("such special treatment of the right to petition would unjustly favor those who through foresight or mere fortuity present their speech as a grievance rather than in some other form.").

accused Mr. Buckley of violating attorney-client privilege, Agency policy, and his Professional Responsibility. Mr. Buckley responded that she was wrong on each accusation. She then imposed a direct order on Mr. Buckley not to discuss the EEOC case with anyone but her and another attorney. Ms. Meis also indicated that she intended to impose discipline on Mr. Buckley. Mr. Buckley then informed Ms. Meis that he would seek informal EEO counseling, after repeated attempts to explain that as an attorney at law he needed to defend himself against such false and defamatory statements and that she needed to stop in her tirade. On August 1, 2002, Ms. Meis did initiate what she termed a counseling session with Mr. Buckley. Mr. Buckley requested that they not discuss issues that were involved in litigation, as he had already contacted CREO and asked for informal counseling, and contemplated filing a personal injury claim, and documents with the Office of Special Counsel as a prerequisite to filing a personal injury claim with the Social Security Administration. Ms. Meis refused his request and continued to question him, under his protest, about the actions of the office staff, the relationship with the client in question, and his own conduct relevant to the same. Mr. Buckley did seek informal EEO counseling with Regional CREO beginning July 31, 2002, and filed a formal complaint of discrimination with the EEOC on September 28, 2002. Mr. Buckley, after following the requisite administrative processes and after receiving authorization from the Office of Special Counsel, did file an Appeal with the Merit Systems Protection Board on September 28, 2002. On August 18, 2002, Mr. Buckley filed a claim for personal injury, citing defamation, with knowledge and witnesses that Ms. Meis had published her false accusations, and intentional infliction of emotional distress, with the Social Security Administration Claims Officer. With the knowledge that Mr. Buckley had requested informal counseling with CREO, Ms. Meis began to interfere with Mr. Buckley's efforts to conduct his business as a public employee. On

September 13, 2002, Mr. Buckley presented for editing to Christine R. Hendon a Ninth Circuit Court of Appeals brief. An emergency evacuation occurred in the office building the same day and the brief could not be served on September 13, 2002, the day service was required. On September 13, 2002, Mr. Buckley contacted the Clerk of the Ninth Circuit Court of Appeals in San Francisco, and asked what he should do under the circumstances. The Clerk advised Mr. Buckley to submit a Motion to file Late brief with a sworn declaration explaining the circumstances for the delay. On September 13, 2002, Mr. Buckley contacted Ms. Hendon and relayed the information provided by the Clerk, and asked her to contact Ms. Meis to provide her with the same information. Ms. Hendon did not contact Ms. Meis as requested. On September 13, 2002, Mr. Buckley sent an email to all involved, including Ms. Meis, explaining the requirements. On September 16, 2002, Ms. Hendon presented the brief to Mr. Buckley for final review and Mr. Buckley noted that Ms. Hendon had re-corrected editing comments that he himself had previously indicated. Mr. Buckley informed Ms. Hendon that she had accessed the wrong brief for editing and copied the letter to Ms. Meis. On September 16, 2002, for two hours, Ms. Meis, in the presence of Ms. Hendon, argued with Mr. Buckley over precisely just what brief Ms. Hendon should have accessed. On September 16, 2002, at four o'clock in the afternoon, Mr. Buckley asked Ms. Meis to be reasonable and agree to discuss the matter at another time as the brief needed to be served as soon as possible in compliance with the directive from the Clerk and the requirements of submitting the motion with due diligence. Ms. Hendon refused to complete the brief and then left Mr. Buckley's office. On September 16, 2002, Ms. Meis began screaming and yelling at Mr. Buckley. She was visibly angry and her face was red and began to close the distance between her and Mr. Buckley in a threatening manner, while Mr. Buckley was seated. Mr. Buckley repeatedly asked Ms. Meis to lower her voice and to calm down, and duly informed her that she was not acting in a proper manner

for a supervisor. On September 16, 2002, Mr. Buckley did experience real and reasonable apprehension that Ms. Meis threatened his personal emotional and physical safety.

4. On September 16, 2002, Ms. Meis imposed unlawful direct orders on Mr. Buckley not to argue with her, and not to identify and discuss her discrimination against him in her or any other person's presence. On September 16, 2002, Mr. Buckley contacted Federal Protective Services and advised them of the occurrence, stating that he felt his personal physical and emotional safety was in danger. On September 16, 2002, Ms. Meis returned to Mr. Buckley's office and began again to argue, and Mr. Buckley informed her that he had contacted Federal Protective Services and asked her to leave his office as she had placed him in concern for his personal physical and emotional safety. She repeated her imposition of an unlawful direct order not to argue with her and when Mr. Buckley insisted she leave or he would have to contact Federal Protective Services to have her removed, she did leave his office.

5 Thereafter, on October 31, 2002, Ms. Meis imposed additional discipline, stating that appellant would have to submit all of his work for review. She based this discipline on allegations that Mr. Buckley demonstrated were wrong and were based on assumptions that were untrue or factually inaccurate. She also improperly disclosed confidential information from Mr. Buckley's SF-7B file. Ms Meis herself had previously sent an email to the Seattle OGC staff on July 21, 2002, relaying a directive prohibiting such a disclosure.

6. Early cases decided by this Court determined held that the Fourth Amendment is applicable only when a search was undertaken for criminal investigatory purposes,[20] and until only recently, has employed a reasonableness test for such searches

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[20] In re Strouse, 23 Fed. Cas. 261 (No. 13,548) (D. Nev. 1871); In re Meador, 16 Fed. Cas. 1294, 1299 (No. 9375) (N.D. Ga. 1869).

without requiring either a warrant or probable cause in the absence of a warrant.[21] But in 1967, the Court held in two cases that administrative inspections to detect building code violations must be undertaken pursuant to warrant if the occupant objects.[22] "We may agree that a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime . . . But we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely 'peripheral.' It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."[23] The decisive cases announcing these precepts, Camara and See, were reaffirmed in Marshall v. Barrow's, Inc.,[24] in which the Court held violative of the Fourth Amendment a provision of the Occupational Safety and Health Act which authorized federal inspectors to search the work area of any employment facility covered by the Act for safety hazards and violations of regulations, without a warrant or other legal process. The liquor and firearms exceptions were distinguished on the basis that those industries had a long tradition of close government supervision, so that a person in those businesses gave up his privacy expectations.

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[21] Abel v. United States, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960); Frank v. Maryland, 359 U.S. 360, 79 S.Ct. 809, 3 L.Ed.2d. (1959) overuled in part by Camara v. Municipal Court, 387 U.S. 523, 534, 87 S.Ct 1727, 1733, 18 L.Ed.2d 930 (1967) (to thte extent that it sanctioned warrantless inspections); Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946).

[22] Camara, 387 U.S. at 523, 87 S.Ct. at 1727, 18 L.Ed.2d at 930 (home); See v. City of Seattle, 387 U.S. 541 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967) (commercial warehouse).

[23] Camara, 387 U.S. at 530, 87 S.Ct. 1731, 18 L.Ed.2d.

[24] 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978). Dissenting, Justice Stevens, with Justices Rehnquist and Blackmun, argued that not the warrant clause but the reasonableness clause should govern administrative inspections. Id. at 325.

7. On October 4, 2002, ABC Legal Services did duly serve, at Plaintiff's direction, upon Lucille G. Meis the Summons and Complaint in the instant case, along with the many other documents required for proper application for a temporary restraining order and motion for a preliminary injunction. Service was accepted and duly signed for by Christine R. Hendon, Ms. Meis' agent and office staff assistant, Office of the General Counsel, Social Security Administration.

On the same day as service the Summons and Complaint in the instant case, along with the many other documents required for proper application for a temporary restraining order and motion for a preliminary injunction, October 4, 2002, Ms. Meis did retaliate against Mr. Buckley by unlawfully searching his office for her own unlawful purposes and was accompanied by Ms. Hendon, her agent.

Ms. Meis' pretext for the search was that she could not find documents that Mr. Buckley had completed and that Ms. Hendon had failed to serve in proper form to opposing counsel. Mr. Buckley had informed Ms. Meis and Ms. Hendon earlier the morning of October 4, 2002, that opposing counsel in a Ninth Circuit Court of Appeals case had contacted Mr. Buckley and informed him that opposing counsel was missing two pages from the same brief. Mr. Buckley had also informed Ms. Meis and Ms. Hendon that Mr. Buckley himself had searched for the brief and could not find it where it would normally be located, in the office file room.

8. On October 4, 2002, Ms Meis and Ms Hendon did, for their own purposes and in disregard of Plaintiff's Right to Privacy, and his reasonable expectation thereof, search Plaintiff's office after Mr. Buckley had already informed them that he had looked for the file and could not find it. There was no reason to expect that Mr. Buckley would maintain the missing brief or file in his office, and Ms. Meis and Ms. Hendon conducted the unlawful search without reasonable basis and for their own

purposes of harassing and retaliating against Mr. Buckley for his exercise of his entitlement to lawful redress, particularly the lawful redress Mr. Buckley seeks from this Court.

On October 4, 2002, Ms. Meis failed to make reasonable inquiry to the management analyst, Rebecca Halvorsen, who does most of the filing for the office. Ms. Halvorsen did indeed have possession of the file. There is absolutely no reason why Ms. Meis and Ms. Hendon had any legitimate need to search Plaintiff's office, considering that Ms. Hendon was able to provide opposing counsel with the missing pages to Plaintiff's brief without actual possession of the file copy of the brief in question.

Additionally, on October 4, 2002, the circumstances displayed that no immediacy was associated with the need by opposing counsel for the missing pages, as Ms. Hendon was able to provide the same immediately. Further, the response from Ms. Halvorsen, who would be reasonably expected to have possession of the brief, came very shortly after the entire incident and Ms. Halvorsen indicated that she possessed the brief and other relevant files.

9. On the same day as service the Summons and Complaint in the instant case, along with the many other documents required for proper application for a temporary restraining order and motion for a preliminary injunction, October 4, 2002, Ms. Meis, Ms. Hendon, and an unidentified "colleague" did engage in a further invasion upon Plaintiff's privacy by requiring an LAN Administrator located in Baltimore, Office of Special Counsel, to relocate files from Mr. Buckley shared drive to a personal drive on his office computer. (ER 94). The LAN Administrator, Ryan Nakielny, has admitted to the conduct and has stated that he did so at the request of Ms. Meis. (ER 94-95). Ryan Nakielny was unable to provide legitimate authority for his actions, and when questioned a second time specifically to provide written or verbal

authority that would provide a legitimate basis for the intrusion, he failed to respond.

Mr. Buckley asked Ms. Meis, on two separate occasions, to provide the name of the LAN Administrator and she refused. Mr. Buckley had to seek out the name of the public employee, Ryan Nakielny, by his own means, insisting that a public employee's identity must be revealed upon request, particularly under the circumstances of the illegal intrusion upon Plaintiff's privacy by Ms. Meis, Christine Hendon, an unnamed "colleague," and Ryan Nakielny. At no time did Ms. Meis or any of her agents attempt to contact Mr. Buckley to inquire about the files in question and request that they be moved to another location on the office computer system.

10. The due process protections of the Fifth Amendment prohibit government employers from depriving any person of life, liberty, or property, without due process of law.[25] Those protections apply to "government deprivation of those perquisites of government employment in which the employee has a constitutionally protected 'property' interests'".[26] Public employees who can establish a property interest in their continued employment cannot be deprived of that interest without due process.[27] This Court has not had occasion to decide whether due process protections extend to discipline of public employees short of termination.[28] A public employee is entitled to procedural, as opposed to substantive, due process before being deprived of a

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[25] See Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Perry v. Sindermann, 408 U.S. 593, 92 S.Ct 2694, 33 L.Ed 2d 570 (1972).

[26] Gilbert v. Homer, 520 U.S. 924, 928, 117 S.Ct. 1807, 1811, 138 L.Ed.2d 120 (1997).

[27] See Yearous v. Niobrara Country Memorial Hospital, 128 F.3d 1351 (10th Cir. 1997) (constructive discharge from position in which employee has protected property interest may be actionable under 42 U.S.C.A. § 1983) citing Bailey v. Kirk, 777 F.2d 567 (10th Cir. 1985).

[28] See Gilbert v. Homar, 520 U.S..at 931, 117 S.Ct. 1813, 138 L.Ed 2d (1997).

property interest in employment.[29] In order to recover for a denial of procedural process, a plaintiff must show that the public employer interfered with a public interest without affording constitutionally required procedural safeguards.[30] A claimant may establish a property interest in continual employment by showing that applicable state laws, municipal ordinances, administrative regulations, or university rules create a reasonable expectation of such employment. A person's interest in a governmental benefit, including employment, is a "property interest" subject to procedural due process protection if claim of entitlement to the benefit is supported by rules of the agency affording the benefit or by "mutually explicit understandings."[31]

11. "In procedural due process claims, the deprivation by [governmental] action of a constitutionally protected interest in "life, liberty, or property" is not itself unconstitutional; what is unconstitutional is the deprivation of such interest without due process of law.[32] Once an employee establishes that she or he has a property interest in continued public employment so that the Due Process Clause applies, "the question remains what process is due."[33] That law, as developed by the courts over the years,

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[29] Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L.Ed.2d 494 (1985).

[30] E.g., Sanchez v. Santa Ana, 915 F.2d 424 (9th Cir. 1990) (removal of plaintiff's merit pay, coupled with "significant aggravating factors"); Rathjen v. Litchfield, 878 F.2d 836 (5th Cir. 1989) (constructive discharge intended to force employee to sacrifice due process protection).

[31] Perry, 408 U.S. at 601, 92 S.Ct. at 2699, 33 L.Ed 2d 570). E.g., Samuel v. Holmes, 138 F.3d 173 (5th Cir. 1998) (probationary teacher has tenure where state law precludes dismissal without just cause). See Jones v. University of Cent. Oklahoma, 13 F.3d 361 (10th Cir 1993) (implied contract or claim of entitlement based upon mutually explicit understandings must be established under state law).

[32] Zinermon v. Burch, 494 U.S. 113, 110 S. Ct 975, 108 L.Ed2d 100 (1990).

[33] Cleveland v. Board of Education v. Loudermill, 470 U.S. 532, 105 S. Ct 1487, 84 L.Ed. 2d 494 (1985), quoting from Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972). See Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364, 129 L.Ed.2d 383 1994); Bussinger v. New Smyrna Beach, 50 F.3d 922 (11th

makes clear that the requirements of due process are flexible, depending upon the nature and extent of the available procedural safeguards, and the competing interests at stake, namely the employee's private interest in retaining employment, the government interest in expeditious removal of unsatisfactory employees and avoidance of administrative burdens and the risk of an erroneous termination.[34]

12. On August 1, 2002, Ms. Meis did initiate what she termed a counseling session with Mr. Buckley. Mr. Buckley requested that they not discuss issues that were involved in litigation, as he had already contacted Civil Rights and Equal Opportunity (CREO) and asked for informal counseling, and contemplated filing a personal injury claim, and documents with the Office of Special Counsel as a prerequisite to filing a personal injury claim with the Social Security Administration. Ms. Meis refused his request and continued to question him, under his protest, about the actions of the office staff, the relationship with the client in question, and his own conduct relevant to the same.

13. Mr. Buckley did seek informal EEO counseling with Regional CREO beginning July 31, 2002, and filed a formal complaint of discrimination with the EEOC on September 28, 2002. Mr. Buckley, after following the requisite administrative processes and after receiving authorization from the Office of Special Counsel, did file an Appeal with the Merit Systems Protection Board on September 28, 2002.

14. On August 18, 2002, Mr. Buckley filed a claim for personal injury, citing defamation, with knowledge and witnesses that Ms. Meis had published her false accusations, and intentional

Cir 1995) (plaintiff is required to show only that available remedies were inadequate, not that all available remedies have been exhausted).

[34] Logan v. Zimmerman Brush Company, 455 U.S. 422, 102 S. Ct 1148, 71 L.Ed2d 265 (1982); Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 17 (1975), quoted with approval in Gilbert v. Homer, 520 U.S. 924, 117 S. Ct. 1807, 138 L.Ed2d 120 (1997); Caine v. Hardy, 943 F.2d 1406 (5th Cir. 1991) (en banc).

infliction of emotional distress, with the Social Security Administration Claims Officer.

15. With the knowledge that Mr. Buckley had requested informal counseling with CREO, Ms. Meis began to interfere with Mr. Buckley's efforts to conduct his business as a public employee. Concerning the unlawful imposition of her orders forcing Mr. Buckley to submit all of his work for her for review, an order that was not permitted according to Mr. Buckley's position description Ms. Meis never provided Mr. Buckley with any substantiation of such a unlawful order. Ms. Meis never provided Mr. Buckley any documentation of the same, and certainly did not provide him fundamental due process, being notice and an opportunity to be heard. As to the imposition of the unlawful orders to not speak to the client, Office of Hearings and Appeals, and not to argue with Mr. Meis, when it was Mr. Buckley's responsibility to present all views of any issue as an attorney at law and an assistant regional counsel, Mr. Buckley was also deprived of any opportunity to seek redress from with the Agency. Ms. Meis unilaterally imposed these unlawful orders without providing Mr. Buckley, once again, fundamental due process. Ms. Meis did not prove Mr. Buckley any authority under which she could possibly order Mr. Buckley to not discuss her discrimination against him. Mr. Buckley informed Ms. Meis' superiors of this unlawful order, but they failed to even acknowledge receipt of his messages.

16. The Ku Klux Klan Act of 1871 made criminal private conspiracies against governmental or court operations, authorized the presidential use of troops against conspiracies that effectively interfere with state or federal civil rights laws, and also established civil liberties for the deprivation of civil rights. One section of that Act created a civil action for the deprivation of civil rights under color of law, and in its present form is identified as 42 U.S.C. § 1983. Section 1983 accords a federal remedy for deprivation, by persons acting under color of state law, of federal

constitutional rights. The law "was intended to 'override' discriminatory or otherwise unconstitutional state laws, and to provide a remedy for violations of civil rights "where state law was inadequate [or] unavailable in practice." Since intentional employment discrimination may constitute a violation of the Equal Protection Clause of the federal Constitution, Section 1983 offers an avenue of relief for such discrimination against state or local officials acting in a personal capacity and against municipalities, subject to applicable immunities.

17. In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, this Court provided a judicially created cause of action against federal officials in their personal capacity. The purpose of a Bivens action is to punish the individual agents who have engaged in unconditional action. Only Congress has the power to decide that a statutory or administrative scheme will foreclose a Bivens action.

18. Mr. Buckley initiated an action in the United States District Court, Western District of Washington, delineating among his causes of action, inter alia, violations of his First Amendment, Fourth Amendment, and Fifth Amendment rights and privileges as provided under the Bill of Right to the United States Constitution.[35] Mr. Buckley also identified as a cause of action the judicially created remedy identified in Bivens. (App. A). The district court granted Respondents' motion to dismiss, stating that Mr. Buckley's constitutional claims under the First, Fourth [and ostensibly the Fifth] Amendments were themselves dismissed because 42 U.S.C § 1983 does not provide a remedy against a federal official who violates federal law. The district

[35] Mr. Buckley also identified violations of Title VII of the Civil Rights Act of 1964, but has elected to pursue his administrative remedies in that regard. He also cited violations of his constitutional rights under the Sixth and Fourteenth Amendments in his First Amended Verified Complaint, but choices not to argue these violations before the Court in consideration of their limited relevance to the instant argument.

court also stated that the Civil Service Reform Act (CSRA) precluded Mr. Buckley's Bivens claims because the CSRA was an elaborate scheme that provided an administrative remedy to federal employees who allege prohibited personnel practices. A federal employee must remedy constitutional violations through the Office of Special Counsel, which can petition the Merit Systems Protection Board.

19. The Court of Appeals for the Ninth Circuit affirmed (App A).

a. The court of appeals construed Mr. Buckley's claims, as did the district court, to assert, "it is possible to raise § 1983 claims against the federal government." The court state that it understood Mr. Buckley's claim to state that despite the general rule that § 1983 does not apply to federal officials, the court may still hold that he properly stated a claim under the same statute. The court concluded that this claim, as construed by the court, failed because the court's case law established that a § 1983 action was not available to redress actions taken under color of federal law. The court concluded that the district court did not err in dismissing what the district court and the court of appeals identified as Mr. Buckley's § 1983 claims.

b. The court of appeals also correctly determined that Mr. Buckley was asserting that the CRSA did not prevent him from bringing a Bivens action.[36] The court stated that even if CSRA did not provide Mr. Buckley with an adequate remedy, the inadequacy of a statutory remedy is irrelevant to the issue of preclusion. The court also determined that because the alleged unconstitutional conduct fell within the scope of the CSRA, the district court lacked jurisdiction to bar the Bivens claims on that

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[36] Again, although the court of appeals correctly identified that Mr. Buckley also asserted violations of Title VII of the Civil Rights Act of 1964, since he has elected to pursue his administrative remedies in that regard, Mr. Buckley will not argue that cause of action before this Court.

conduct, and concluded the district court did not err in dismissing Mr. Buckley's Biven's claims.

REASONS FOR GRANTING THE PETITION

Review by this Court is warranted to determine (1) whether an aggrieved public employee may properly assert violations of her or his constitutional rights separate and independent from an action under 42 U.S.C. § 1983, or a Bivens[37] action, as part of her or his right to "petition the Government for a redress of grievances," and (2) whether the decision in the instant matter by the court of appeals, being in conflict on a matter of federal law with decisions of other court of appeals, as to which federal courts can exercise independent judgments, warrants that this Court not only brings about uniformity of decisions, but as well suggests that this Court exercise its supervisory powers.

Mr. Buckley has not only asserted a 42 U.S.C. § 1983 claim, but he has identified malicious, intentional, and unlawful violations of his First, Fourth, Sixth, and Fourteenth Amendments rights under the United States Constitution. In order to maintain his job, Plaintiff was required to endure harassment and retaliation, as identified above, by the imposition of unlawful orders. These orders not only violated the terms of his position description, they were a patently unlawful attempt to silence his protest against the discrimination to which he was subjected.[38] This amounts to improperly coercing Plaintiff to believe that a constitutional violation is a permissible action by a public official and therefore, discourages him from fulfilling his obligation to seek to prevent such conduct, particularly when it is directed at

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[37] Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. at 388, 29 L.Ed .at 619, 91 S.Ct. at 1999.

[38] Givhan, 142 F.3d at 1382; Coadyl, 187 F.3d at 734 (7th Cir. 1999).

Plaintiff himself.[40] Mr. Buckley is under an oath, as are most attorneys, to uphold the laws of the United States Constitution, and this fact needs no citation. Defendants seek to prohibit Plaintiff from adhering to that sworn oath.

Whether or not speech may be fairly characterized as constituting speech on a matter of public concern, must be determined by the content, form and context of a given statement. An employee's expression may be fairly characterized as constituting expression on a matter of public concern when it "relates to any matter of political, social or other concern to the community."[41] Under current law, public employment may not be conditioned on a basis that infringes the employee's constitutionally protected interest in freedom of expression.[42] Mr. Buckley's opinions formed in the course of his employment as a public employee are inherently a matter of public concern, particularly because his opinions effect the decisions he must make in the public interest. He cannot function as a public employee in his particular type of employment without arguing his opinion, or by identifying discrimination, particularly when it is directed at him. Ms. Meis has prohibited him from doing exactly that by unlawful direct orders. Mr. Buckley has not relinquished the First Amendment rights he would otherwise enjoy as citizens to comment on matters of public interest by working for the United States Government.[43] Ms. Meis has unlawfully prevented Mr. Buckley from exercising his freedom of speech on a public matter, in violation of his Constitutional right under the First Amendment. Most certainly, under current law, public employment may not be conditioned on a basis that

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[40] See, e.g. Buckley v. Valeo, 424 U.S. 1, 19, 96 S.Ct. 612, 634 (1976).

[41] Connick, 461 U.S. at 146, 103 S.Ct. at 1690, 75 L.Ed.2d 708.

[42] See, e.g. Kevishian v. Board of Regents, 385 U.S. 589, 605, 87 S.Ct. 675, 685, 17 L.Ed.2d 629 (1967).

[43] See Pickering v. Board of Ed. of Township High School Dist. 205, Will City, 391 U.S. 563, 568 (1968).

infringes the employee's constitutionally protected interest in freedom of expression.[43] An employer must proceed with "a certain amount of care," as otherwise described, "the care that a reasonable manager would use before making an employment decision." If an improper motive sets in motion events that lead to termination, the fact that the final decision maker was not improperly motivated does not defeat the resulting First Amendment claim. The adverse action in question may consist of discharge, or actions short of discharge, such as promotion, transfer, recall and hiring decisions. In fact, virtually any retaliatory action is actionable if it involves harassment, or a change in duties, pay, benefits or perquisites of office; formed in the course of his employment as a public employee are inherently a matter of public concern, particularly because his opinions effect the decisions he must make in the public of his Constitutional right under the First Amendment.

The court of appeals did not identify Mr. Buckley's' separate and distinct claim of an infringement on his First Amendment right to entitling him to freedom of expression, his Fourth Amendment Fourth Amendment rights provided under the Search and Seizure Clause ensuring him protection from unlawful search and seizure and allowing him an expectation of privacy, when reasonable, prohibiting unlawful instruction upon the same, and the Fifth Amendment Due Process Clause ensuring him due process of law, but rather confused his assertion of a violation of the same as a cause of action under 42 U.S.C. § 1983 and apparently unconstitutional conduct that fell within the scope of the CSRA.

Oddly, the court of appeals, in a separate opinion, has stated explicitly its own recognition of the fact that constitutional causes of action are themselves independently actionable. "The determination of whether public employee speech is protected

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[43] See, e.g. Kevishian, 385 U.S. at 605.

under the First Amendment is a question of constitutional law that we review de novo."[44] Precisely why the court of appeals has decided to confuse Mr. Buckley's constitutional claim's with an action under 42 U.S.C. § 1983, and base its decision upon that inappropriate denial of Mr. Buckley's legitimate claim of his First Amendment cause of action, along with his other constitutional claims, escapes jurisprudential precedent or logical analysis. It is axiomatic that the right to petition the government may be invoked by persons seeking to terminate an employee's employment as well as by the employee.

20. The technical aspect that is critical in this action is that in actuality, 42 U.S.C. § 1983 also affords relief where a federal statute creates specific identifiable rights intended to benefit the plaintiff, unless it can be shown that Congress intended to foreclose such relief. Employees alleging violations of both modern civil rights statutes and separate constitutional or statutory rights cognizable under Section 1983 may pursue remedies under both statutes, subject to applicable timeliness, res judicata, and collateral estoppel doctrines in either state or federal courts. Consequently, when Mr. Buckley requested that the courts below consider that 42 U.S.C. § 1983 only facially disallowed bringing such action in federal court, he was making a proper argument for an extension of existing law. The court below entirely confused his attempt by combining Mr. Buckley's plainly independent constitutional claims with a Section 1983 action, when constitutional claims need not necessarily is brought under such a statutory action. The court consequently dismissed on a wholly improper basis.

21. In regard to Mr. Buckley's assertion that General Attorneys in the excepted service have not only been omitted from coverage by the CSRA, but that the omission cannot be said to have been

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[44] See Tucker v. State of Cal. Dept of Educ., 97 F. 3d 1204, 1209 n 2 (9th Cir. 1996).

intentional by Congress is a matter that which at least three courts of appeal has decided, as a legal issue, in opposite ways. These courts have done so based on the same matter of federal law in their holdings in different cases with very similar facts.[45] The court of appeals, following the opinions in that jurisdiction, stated that the inadequacy of the statutory remedy under the CSRA as available to Mr. Buckley is irrelevant to the issue of preclusion, even though the CRSA provides Mr. Buckley, in his status as a General Attorney in the excepted service, no remedy at all.[46] Mr. Buckley has continually maintained that this Court did not, in Bush v. Lucas, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983), announce that the CSRA precludes federal employees' Bivens claims based on prohibited personnel actions, as the court of appeals Circuit has misinterpreted. Id. The same court of appeals also cites Schweiker v. Chilicky, 487 U.S. 412, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988), for the same proposition. Id. In Schweiker, this Court defined the decision in Bush, stating it

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[45] To Mr. Buckley's knowledge, one of the prime purposes of the certiorari jurisdiction is to bring about uniformity on matters among the federal courts of appeals. See, e.g. Thompson v. Keohane, 516 U.S. 99, 106, 116 S.Ct. 457, 462, 133L.Ed.2d. 383 (1995) (certiorari granted where the circuits disagreed on the proper application of federal habeas corpus states "[b]ecause uniformity among federal courts is important on questions of this order).

[46] The court of appeals also decided that "[b]ecause the alleged unconstitutional conduct falls within the scope of the CSRA, the district court lacked jurisdiction to hear the Bivens claims based on the conduct. (App. A). This is a nonsequitor considering the court of appeals first decided that Mr. Buckley's 42 U.S.C. § 1983 action, which would necessarily include citation of constitutional violations, was "not available to redress actions taken under color of federal law." (App. A). The court of appeals than additionally found that Mr. Buckley's constitutional claims some how also fell with his claim under Bivens. The only meaningful reference Mr. Buckley can find to his separate and distinct claims of constitutional violations as permitted by decision of this Court is the following sentence from the court of appeals: "[a]ny other argument not specifically addressed herein is deemed to be without merit." (App. A). Mr. Buckley respectfully submits that such an obscure determination does not provide him with fundamental due process.

refused to "decide whether or not it would be good policy to permit a federal employee to recover damages from a supervisor who has improperly disciplined him for exercising his First Amendment rights."[47] It is important to note that the Bush Court assumed for purposes of decision that "civil service remedies were not as effective as an individual damages remedy."[48]

The court of appeals offered as an example of its current position on the unavailability of a Bivens claim to a public employee ostensibly falling within the purview of the CSRA the case of Orsay v. United States Dep't of Justice, 289 F.3d 1125, 1128 (9th Cir. 2002) ([w]e have previously rejected Appellants' second argument, holding that the CSRA preempts federal claims that fall within its scope even when the statute provides no alternative remedy). This is the essence of the court of appeals argument, and the Ninth Circuit's position on Biven's actions. Specially, the court of appeals states that even though the CSRA provides no specific remedy to Mr. Buckley, a federal employee is without an effective remedy under the CSRA, since the CSRA precludes the employee's Bivens action because congressional action has not been inadvertent in providing certain remedies and denying others to judicial employees.[49] A decision of the Ninth Circuit supportive of Mr. Buckley's position was available when the court of appeals decided against Mr. Buckley, but the court of appeals did not to it refer. In Morgan,[50] the Ninth Circuit

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[47] Id. at 423, citing Bush, 462 U.S. at 389.

[48] Id. 462 U.S. at 372, 103 S.Ct. at 2408.

[49] See Blankenship v. McDonald, 176 F.3d 1192, 1195 (9th Cir. 1999).

[50] Morgan v. United States, 323 F.3d 776, 780 (2002). See also Collins v. Bender, 195 F.3d 1076, 1080 (9th Cir. 1999) (Congress intended for the CSRA to be the sole mechanism through which employment disputes are settled. (citations omitted) But we do not believe that Congress intended to deputize government supervisors as chieftains of security forces that police the private lives of their employees subject only to some administrative oversight, and we do not believe that Congress meant to shoehorn into the CSRA every odd occurrence where a supervisor forms

announced that a Bivens action was improperly dismissed under Fed.R.Civ.P. 12(b)(6), with the Government defendants' improperly maintaining that a heightened pleading standard should be applied.[51] Morgan based his Bivens claims on the basis that his car was unreasonably searched in violation of the Fourth Amendment. The Ninth Circuit determined that Morgan's Complaint sufficiently set forth the elements of a Bivens claim by alleging a violation of his constitutional rights by agents acting under the color of federal law.[52]

This Court has determined that it understands the intent of Congress to be quite otherwise.[53] In a case that did not specifically involve the direct relationship here between an excepted employee right to judicial recourse when he was without a statutory remedy, but rather involved an employee's recourse when he did have a statutory remedy, this Court determined that

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and leads such a renegade posse).

[51] The United States Attorney, Western District Of Washington, made precisely the same error in the instant matter, also improperly citing for this incorrect assertion Branch v. Tunnel, 937 F.2d 1382 (9th Cir. 1991) as overruled by Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002). No court to date in this action has recognized this flaw in legal argument that continues unabated.

[52] This intra circuit conflict relates to a recurring and important issue concerning the judicially created Bivens action, and now represents a "widespread conflict among the circuits." See Commissioner v. Estate of Bosch, 387 U.S. 456, 457, 87 S.Ct 1776, 1777, 18 L.Ed.2d 1886 (1967); see also Scarborough v. United States, 431 U.S. 563, 567 n4, 97 S.Ct. 1963, 1965 n4, 52 L.Ed.2d 582 (1997).

[53] Carlson v. Green, 446 U.S. 14, 15, 100 S. Ct. 1468, 1470, 64 L.Ed.2d 15 (1980). The Court identified the following factors in support of its conclusion that Congress did not intend to limit a respondent to an FTCA action: (I) the Bivens remedy, being recoverable against individuals, is a more effective deterrent than the FTCA remedy against the United States; (ii) punitive damages may be awarded in a Bivens suit, but are statutorily prohibited in an FTCA suit; (iii) a plaintiff cannot opt for a jury trial in an FTCA action as he may in a Bivens suit; and (iv) an action under the FTCA exists only if the States in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward. Such factors are nearly identical to those that the court of appeals would limit in an action under the CSRA.

an employee does indeed have a remedy when he has experienced a wrong.[54] Other jurisdictions, as expressed by the rulings of their respective court of appeals, have followed this reasoning from the Court.

The Seventh Circuit Court of Appeals has expressed its opinion that something more than the negative inference as advanced by the Ninth Circuit is necessary before a Bivens action may be denied a moving party unprotected by an administrative scheme. The Seventh Circuit, lending a comprehensive analysis to circumstances when a Bivens action protects a party and when it does not, has stated that it believes that significant procedural

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[54] See United States v. Fausto, 484 U.S. 439, 439, 108 S.Ct. 688, 688, 98 L.Ed.2d 830 (1988). This Court determined that "if employee is found by 'appropriate authority' to have undergone unwarranted personnel actions, suit for [damages] will lie." Id. at 454. Justice Blackmun, in a concurring opinion, stated, in so many words, that an action in the nature of Mr. Buckley's suit, is particularly appropriate:

> I join the Court's opinion, because of the persuasive evidence it marshals for the proposition that Congress intended the CSRA to "replac[e] the patchwork system with an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." Ante, at 672. I do not believe, nor do I read the majority opinion to suggest, that our well-established aversion to recognizing "implied" repeals of remedial provisions or of judicial review is any weaker when what is "repealed" finds its source in our cases rather than in specific statutory texts. For example, this Court long has recognized that the Constitution itself supports a private damages action against a federal official, Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 619 (1971), and that the courts' common-law power to vindicate constitutional rights, see David v. Passman, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed. 846 (1979); Carlson v. Green, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d. 15 (1980), is not lightly to be set aside.

Id. at 455.

distinctions exist between the remedies provided by statutory remedies that have been found to preclude Bivens claims. These distinctions indicate that Congress does not consider the same an adequate remedial mechanism to address Eighth Amendment violations, just as surely as it does not consider the FTCA an adequate mechanism to remedy non-work-related prisoner claims. The Seventh Circuit referenced as its rationale the deterrence factor identified in Carlson as well as the recognized necessity to provide some forum for a prisoner's constitutional claims.

Significantly, the Seventh Circuit also noted that in both Bush and Chilicky[55] it was that although the plaintiffs were denied a constitutional remedy, the statutory alternative provided a forum where the allegedly unconstitutional conduct would come to light. The Seventh Circuit noted that in Bush, the plaintiff was protected by an "elaborate" and "comprehensive" civil service system, in which "[c]onstitutional challenges to agency action, such as the First Amendment claims raised by [Bush], were fully cognizable."[56] "This system included the power to hold a "trial-

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[55] Similarly, the plaintiffs in Chilicky were given ample opportunity to unearth in an administrative forum any unconstitutional conduct that may have resulted in the improper denial of their Social Security benefits. Under the established administrative system, a federal administrative law judge reviewed a state agency's denial of benefits, and claimants were entitled to introduce new evidence and raise new issues. If unsuccessful, claimants could seek review by the Social Security Administration's Appeals Council. See 487 U.S. at 424, 108 S.Ct. at 2468. This "elaborate" system, id. at 425, 108 S.Ct. at 2468-69, led this Court to conclude that even though the constitutional injury might go unredressed, Congress "has not failed to provide meaningful safeguards or remedies for the rights of persons situated as respondents were." Id. at 425, 108 S.Ct. at 2468. In fact, this review system alerted Congress that state agencies were routinely terminating benefits improperly and led Congress to amend the statute by continuing benefits pending an ALJ's decision. See id. at 415, 108 S.Ct. at 2463-64. Accordingly, although the Chilicky plaintiffs were concededly not fully compensated for their injuries, the administrative system was effective in exposing the unconstitutional conduct that had occurred.

[56] 462 U.S. at 385-86, 103 S.Ct. at 2414-16.

type hearing" and to secure the attendance and testimony of agency officials."[57] Even if the "existing remedies did not provide complete relief for the plaintiff,"[58] the Court emphasized that Congress had created a system to provide adversely affected civil servants the opportunity to expose the unconstitutional conduct of government officials and thereby would presumably help to deter future unconstitutional conduct.[59] ("Federal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures--administrative and judicial--by which improper action may be redressed.").[60] "However, when the procedural safeguards of an administrative scheme are inadequate protectors of constitutional rights, courts should not readily assume that a Bivens claim is precluded."[6162]

And there lies the contrast between the Ninth Circuit and the Seventh Circuit While the Ninth Circuit maintains that a negative inference that is the absence of any protection for an expected service employee in the CSRA, is sufficient to preclude a Bivens action, the Seventh Circuit plainly disagrees. Mr. Buckley is unable to correct the unconstitutional conduct of the

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[57] Id. at 387, 103 S.Ct. at 2416.

[58] Id. at 388, 193 S.Ct. at 388, 103 S.Ct. at 2417.

[59] See id. at 385, 103, 103 S.Ct. at 2414-15.

[60] See Robbins v. Bentsen, 41 F.3d 1195, 1200 (1994) (If an administrative scheme that did not safeguard a claimant's constitutional rights precluded a Bivens claim, unconstitutional conduct would be insulated from review by any adjudicatory forum. Such a result would stand in sharp contrast to those cases in which courts have held that an administrative scheme precludes a Bivens claim).

[61] Bagola v. Kindt, 131 F.3d 632, 640 (7th Cir. 1997).

[62] Even more implicitly, the Seventh Circuit has announced that the special circumstances counseling hesitation when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective requirement that would obviate a Bivens action call for more than a simple negative inference. An "explicit congressional declaration" of an equally effective remedy is essential." Lojuk v. Quandt, 706 F.2d 1456, 1468 (1983).

named Respondents in any manner, and there exists no procedural safeguards of any administrative scheme adequate to protect his constitutional rights.

Still yet, the Seventh Circuit is not the only other circuit that disagrees with the Ninth Circuit.[63] The most recent Tenth Circuit decision unequivocally on point determined that a Bivens action is available when a plaintiff claims that the individual defendants' intentional acts, unrelated to any agency decision, violated his constitutional rights.[64] In Robbins, the Tenth Circuit Court of Appeals determined that a moving party's claims alleging that the individual defendants' intentional acts, unrelated to any agency decision, violated his constitutional rights were improperly dismissed under Fed.R.Civ.P 12(b)(6).[65] Otherwise stated, when a moving party's allegations of defendants' intentional misconduct are unrelated to any final agency action, they are properly within the scope of a Bivens claim.[66] This is essentially what Mr. Buckley has argued throughout his attempts to seek justice. He has identified individual defendants' and has served them individually, alleging that each defendant acted with individual intentional misconduct that was independent of any

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[63] In addition, several courts have apparently concluded that Bivens established a cause of action for damages arising from the violation of any constitutional right by a federal official. See, e.g., Paton v. La Prade, 524 F.2d 862 (3d Cir 1975); Yiamopusyiannis v. Chemical Abstracts Service, 521 F.2d 1392 (6th Cir. 1975); States Marine Lines, Inc. v. Schultz, 498 F.2d 1146 (4th Cir. 1974); United States ex rel. Moore v. Koelzer, 457 F.2d 892 (3d Cir.1972); Gardels v. Murphy, 377 F.Supp. 1389 (N.D.Ill. 1974); and Butler v. United States, 365 F.Supp. 1035 (D.Haw. 1973).

[64] Robbins v. Wilkie, 300 F.3d 1208, 1212 (2002).

[65] Wilkie, 300 F.3d at 1212.

[66] Although the ostensibly preclusive administrative scheme in Robbins was the FTCA, and in the instant matter the court of appeals has asserted that the preclusive administrative scheme is the CSRA, this Court has recognized that a Bivens action and an action under the FTCA are separate and distinct causes of action arising out of the same transaction. Carlson v. Green, 446 U.S. at 20, 100 S.Ct. at 1472, 64 L.Ed.2d 15.

final agency decision. In fact, Mr. Buckley had predicated his complaint on the fact that the action of the individual defendants' is impermissible because it is unsupported by any agency law, rule, or regulation.

It is perhaps the Eighth Circuit that has focused the argument most well; an argument that is truly one concerned with the separation of powers. Only Congress has the power to decide that a statutory or administrative scheme will foreclose a Bivens action.[67] To allow an administratively-created scheme to foreclose a Bivens action, without some real indication that Congress intended the administratively-created scheme to have that result, would require the courts to hold that the legislative power to foreclose a Bivens action has been delegated-- a delegation almost certainly in violation of the separation of powers doctrine.[68] To assume by negative inference, where Congress has decided not to act, that Congress intended to act, is a stretch of delegated power that allows an exercise of authority that extends far beyond that provided by the United States Constitution. Without constitutional authority, an equally coextensive body of government should not be allowed to assume the same by virtue of a vacuum intentionally left unfilled by a coequal branch that is, in actuality, delegated the power to make laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

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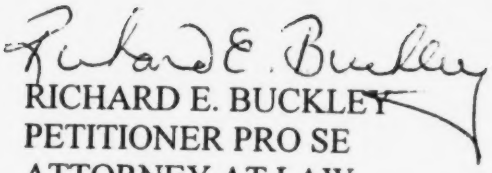
[67] See generally, Chilicky, 487 U.S. 412, 108 S.Ct. 2460, Bush, 462 U.S. 367, 103 S.Ct. 2404.

[68] See Mistretta v. United States, 488 U.S. 361, 370, 109 S.Ct. 647, 654, 102 L.Ed.2d 714 (1989) ("Congress generally cannot delegate its legislative power to another Branch.").

Respectfully submitted,



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December 2003

APPENDIX A

11-19-02
__/s/__FILED ____ENTERED
_____LODGED____RECEIVED

Nov 18 2002
At Seattle
Clerk U.S. District Court
Western District of Washington

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD E. BUCKLEY,

Plaintiff,

v.

LUCILLE G. MEIS, Regional Chief Counsel, Office of General Counsel, Seattle Region X Social Security Administration, CHRISTINE R. HENDON, Staff Assistant, Office of the General Counsel Counsel, Seattle Region X, Social Security Administration, LISA DESOTO, General Counsel, Office of General Counsel, Social Security Administration, RANDOLPH W. GAINES, Deputy Chief Counsel, Office of the General Counsel, Social Security Administration, JO ANNE B. BARNHART, Commissioner of Social Security, BRIAN KIPNIS, Assistant United States Attorney, Office of the United States

No. C02-2051Z

ORDER

Attorney; and JOHN ASHCROFT, United States Attorney General,

Defendants.

This matter comes before the Court on Defendants' motion to Dismiss, docket n. 22.

The Court hereby GRANTS Defendants' motion to dismiss, docket no. 22.

The Court dismisses Plaintiff's Title VII claims for failure to exhaust his administrative remedies. Vinieratos v. United States Dep't of Air Force *ex rel* Aldridge, 939 F.3d 762, 768-69 (9th Cir. 1991).

The Court dismisses Plaintiff's constitutional claims under the First, Fourth, Sixth, and Fourteenth Amendments because 42 U.S.C. § 1983 does not provide a remedy against a federal official who violates federal law. See Cannon v. Univ. of Chicago, 441 U.S. 677; (sic) 700 n. 27, 99 S.Ct. 1946, 60 L. Ed. 2d 560 (1979) ("§ 1983 is assuredly not available for suits the United States"); Wheeldin v. Wheeler, 373 U.S. 647, 652, 83 S. Ct. 1441, 10 L. Ed. 2d 605 (1963) ("[N]o general statute making federal officers liable for acts committed 'under color' but in violation, of their federal authority has been passed."); Dale-Murphy v. Winston, 837 F.2d 348, 355 (9th Cir. 1987).

Furthermore, the Civil Service Reform Act (CSRA) precludes Plaintiff's *Bivens* claims. Bush v. Lucas, 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983); Schweiker v. Chilicky, 487 U.S. 412, 108 S. Ct. 2460, 101 L. Ed. 370 (1988); Saul v. United States, 928 F.2d. 829) (9th Cir. 1991). The CSRA is an elaborate remedial scheme that provides an administrative remedy to federal

employees who allege prohibited personnel practices. A federal employee must remedy violations through the Office of Special Counsel, which can petition the Merit System Protection Board. 5 U.S.C. §§ 1212, 1214, 1204; Saul F.2d at 833.

IT IS SO ORDERED.

DATED this 18th day of November, 2002.

/s/

THOMAS S. ZILLY

UNITED STATES DISTRICT JUDGE

APPENDIX B

FILED

SEP 23 2003

CATHY A. CATTERSON, CLERK
U.S.. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD E. BUCKLEY

Plaintiff - Appellant,

v.

LUCILLE G. MEIS, Regional Chief COUNSEL, Office of General Counsel, Seattle Regional X, Social Security Administration, et al.,

Defendants - Appellees,

and,

RANDOLPH W. GAINES, Deputy Chief Counsel, Office of the General

No. 03-35003

C.D. No. CV-02-02051-TSZ

MEMORANDUM*

Counsel, Social Security Administration; et al.,

Defendants.

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Submitted June 20, 2003**

Before: CHOY, SNEED, AND SKOPIL, Circuit Judges.

Pro se plaintiff-appellant Richard Buckley appeals the district court's dismissal of his claims under 42 U.S.C. § 1983, Title VII of the Civil Rights Act, and Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). On appeal, Buckley argues that his claims should not have been dismissed because: 1) it is possible to raise § 1983 claims against the federal government; 2) he substantially complied with the presentment requirements of Title VII; and 3) the Civil Service

** This panel unanimously finds this case suitable for decision without oral argument. See Fed.R.App.P. 34(a)(2). Appellant's request for oral argument, dated June 28, 2003, is therefore denied.

1 The lack of jurisdiction of a final judgement in this case is not a jurisdictional defect because the judgement was apparently inadvertently not entered and the district court decided all of the issues. See Bankers Trust Co. V. Mallis, 435 U.S. 381, 385-86 (1978).

Reform Act ("CSRA") does not prevent him from brining (sic) a Bivens claim. We have jurisdiction pursuant to 28 U.S.C. § 1291,[1] and we affirm.

I. Constitutional Claims

The dismissal of a § 1983 claim under Fed. R. Civ. P. 12(b)(6) is reviewed de novo. See Kirtley v. Rainey, 326 F.3d 1088, 1092 (9th Cir. 2003). Buckley apparently argues that, despite the general rule that § 1983 does not apply to federal officials, this court may still hold that he properly stated a claim under § 1983. This argument fails because this court's case law clearly establishes that a § 1983 action is not available to redress actions taken under the color of federal law. See, e.g., Flamingo Indus. (USA) Ltd. v. U.S. Postal Serv., 302 F.3d 985, 997 (9th Cir. 2002) (citing Billings v. United States, 57 F.3d 797, 801 (9th Cir. 1995)), cert. granted 123 S.Ct. 2215 (2003). The district court did not err in dismissing Buckley's § 1983 claims.

II. Title VII Claims.

The district court dismissed Buckley's Title VII claims on the ground that he failed to exhaust his administrative remedies because he filed his civil complaint before 180 days from the filing of his complaint with the Equal Employment Opportunities Commission ("EEOC"). We review the district court's dismissal of the Title VII claim for failure to exhaust administrative remedies do novo. See Vinieratos v. United States Dep't of Air Force, 939 F.2d 762, 768 (9th Cir. 1991. Buckley argues that the district court erred in dismissing the claims because, under Summatino v. United States, 255 F.3d 704, 708 (9th Cir. 2001), substantial complaince is sufficient to satisfy the time requirement

of 42 US.C. § 2000e-16(c). Even assuming Sommatino applies here, Buckley did not substantially comply with the time requirements by waiting only two days after his administrative filing to file this action in federal court. See Sommatino, 255 F.3d at 708 ("abandonment or failure to cooperate in the administrative process prevents exhaustion and precludes judicial review").

Buckley also argues that, because the 180-day period elapsed during the pendency of this case, the exhaustion issue is moot. However, the subsequent passage of the 180-day period does not excuse his failure to exhaust his administrative remedies; the complaint must still be dismissed. See Rivera v. United States Postal Serv., 830 F.2d 10-37, 1039 (9th Cir. 1987). The district court did not err in dismissing Buckley's Title VII claims.

III. Bivens Claims.

The district court dismissed Buckley's Bivens claims on the grounds that they are precluded by the CSRA. The district court's dismissal of a claim based on CSRA preclusion is reviewed de novo. See Orsay v. United States Dep't of Justice, 289 F.3d 1125, 1128 (9th Cir. 2002). Buckley contends that preclusion does not apply in this case because the CSRA does not provide him an adequate remedy. However, even assuming, *arguendo*, that this is true, the inadequacy of the statutory remedy is relevant to the issue of preclusion. See id. at 1128-29. Because the alleged unconstitutional conducts falls within the scope of the CSRA, the district court lacked jurisdiction to hear the Bivens claims based on the conduct. See Saul v. United States, 928 F.2d 829, 835-39 (9th Cir. 1991). Therefore, the district court did not err in dismissing Buckley's Bivens claims.

Any other argument not specifically addressed herein is deemed to be with merit.

AFFIRMED.

APPENDIX C

42 U.S.C.A. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub.L. 104-317, Ttile III. § 309(c)), Oct. 19, 1996, 110 Stat. 3853.)